UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

ROBERT S. BERRILLO, et al., Plaintiffs, v. MORTGAGE ELECTRONIC REGISTRATION SYTEMS, INC., et al., Defendants.	Civ. Act. No. 1:11-cv-00338-M-LDA

DEFENDANTS' MOTION TO DISMISS

Pursuant to Fed. R. Civ. P. 12(b)(6), defendants Mortgage Electronic Registration Systems, Inc., Greenpoint Mortgage Funding, Inc., Bank of America, N.A. (successor by merger to BAC Home Loans Servicing, LP), and The Bank of New York Mellon as Successor to JP Morgan Chase Bank, N.A., as Trustee for The Certificateholders for the Structured Asset Investments II Inc., Bear Stearns Alt-A Trust 2004-6, Mortgage Passthrough Certificates, Series 2004-6, move to dismiss all claims in the Complaint for failure to state a cognizable claim on which relief could be granted. This Motion is based on the accompanying Memorandum of Points and Authorities.

Respectfully submitted,

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Dated: December 9, 2013

CERTIFICATE OF SERVICE

I, Harris K. Weiner, hereby certify that on December 9, 2013, a copy of the foregoing document, filed through the CM/ECF system, will be sent electronically to counsel of record.

/s/ Harris K. Weiner
Harris K. Weiner

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INTRODUCTION

Plaintiffs Robert S. Berrillo and Jane M. Berrillo failed to repay a loan secured by a mortgage on their property, and failed to cure the default. After foreclosure proceedings were initiated, they filed this lawsuit, making identically-vague and identically-scattershot allegations as in hundreds of other complaints their counsel filed in this Court. As explained below, the foreclosure has complied fully with Rhode Island law and with documents Plaintiffs executed when they obtained their loan. The Court should dismiss the Complaint with prejudice.

BACKGROUND

I. FACTUAL AND PROCEDURAL HISTORY.[1]

On or about April 14, 2004, plaintiffs Robert S. Berrillo and Jane M. Berrillo ("Plaintiffs") borrowed $240,000.00 from Greenpoint Mortgage Funding, Inc. ("Greenpoint") to purchase property, securing their loan with a mortgage on the property they purchased. Mortgage (Exhibit A hereto) at p. 1; Note (Exhibit B hereto).[2] The Mortgage was granted on property at 94 Grove Street, Providence, RI (the "Property"). Compl. ¶ 1. The Mortgage states in bold letters: "**MERS is the mortgagee under this Security Instrument**." Mortgage at p.1. Plaintiffs agreed to convey the Property "to MERS (solely as nominee for Lender and Lender's successors and assigns) and to the successors and assigns of MERS, with Mortgage Covenants upon the Statutory Condition and with the Statutory Power of Sale." *Id.* at p. 3. The Mortgage further provides (*id.*) that:

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[1] Material facts are taken from the Complaint unless otherwise indicated.

[2] The Court may take judicial notice of the Mortgage, as well as other matters of public record recorded in the City of Providence Land Records. *In re Colonial Mortg. Bankers Corp.*, 324 F.3d 12, 15-16 (1st Cir. 2003). The Court may also consider documents which Plaintiffs relies on, such as the Note, or attaches to the Complaint without converting this motion to dismiss into a motion for summary judgment. *Rederford v. U.S. Airways, Inc.*, 589 F.3d 30, 35 (1st Cir. 2009); *Shaw v. Digital Equip. Corp.*, 82 F.3d 1194, 1220 (1st Cir. 1996).

> MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender including, but not limited to, releasing and canceling this Security Instrument.

The Mortgage also authorized sale of the mortgaged property in the event of a default under the note. Paragraph 22 provides:

> Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument. … If the default is not cured on or before the date specified in the notice, Lender at its option may require immediate payment in full of all sums secured by this Security Instrument without further demand and may invoke the STATUORY POWER OF SALE and any other remedies permitted by Applicable Law. … If Lender invokes the STATUORY POWER OF SALE, … [upon meeting mailing and publication requirements] the Property shall be sold in the manner prescribed by Applicable Law. Lender or its designee may purchase the Property at any sale.

Mortgage at p. 12; Compl. ¶ 30.

On or about July 9, 2009, MERS assigned the Mortgage to The Bank of New York Mellon ("BONY"). Assignment of Mortgage (Exhibit C hereto). Plaintiffs later defaulted on their loan, and a foreclosure sale was held or scheduled. Compl. ¶¶ 38-46.

On August 1, 2011, Plaintiffs filed their Complaint. As part of its Case Management Order filed on August 16, 2011, this Court stayed proceedings in all mortgage-related lawsuits in the District of Rhode Island to allow the parties to engage in settlement and mediation. On November 7, 2013, upon recommendation of the Special Master, the Court lifted the "no-filing" stay.

II. HOW MERS WORKS.

Some of Plaintiffs' allegations concern MERS, and so brief background may be useful. The MERS system "was created by several large participants in the real estate mortgage industry to track ownership interests in residential mortgages." *Bucci v. Lehman Bros. Bank,* 2009 WL 3328373, at *3 (R.I. Super. Ct. Aug. 25, 2009), *aff'd,* 68 A.3d 1069 (2013). "Mortgage lenders and other entities, known as MERS members, subscribe to the MERS system and pay annual fees for the electronic processing and tracking of ownership and transfers of mortgages." *Id*.

MERS operates as follows: When a mortgage loan is originated, the borrower executes a promissory note and a mortgage securing the note. The borrower executes and delivers the note to the lender, and executes the mortgage designating MERS as mortgagee. The mortgage is recorded in the land records where "MERS serves as mortgagee of record holding legal title to [the] mortgage[] in a nominee capacity." *Bucci*, 2009 WL 3328373, at *3. The designation of MERS as mortgagee as nominee for the lender and lender's successors and assigns allows MERS members to sell and transfer interests in the secured note while MERS "remains the mortgagee of record." *Rutter v. Mortg. Elec. Registration Sys., Inc.*, 2012 WL 894012, at *3 (R.I. Super. Ct. Mar. 12, 2012). Because MERS remains mortgagee of record when the lender sells the note to another MERS member, there is no need to assign the mortgage because the mortgagee of record has not changed. *Id.*

ARGUMENT

I. THE COMPLAINT FAILS TO STATE A CLAIM, AND SHOULD BE DISMISSED, BECAUSE THE FORECLOSURE COMPLIED FULLY WITH RHODE ISLAND LAW.

The Complaint offers a jumble of allegations to assert a claim to challenge the foreclosure of Plaintiffs' former property. However, the Court should dismiss their Complaint because the foreclosure proceedings appear to have complied fully with Rhode Island law, and the document Plaintiffs executed when they obtained the loan.[3]

A. Plaintiffs' Challenges To Foreclosure Are Meritless.

To the extent Plaintiffs claim to challenge a completed foreclosure, they face an extremely high hurdle under Rhode Island law.[4] After a sale is completed, Rhode Island law creates a heavy presumption that the foreclosure was correct and proper.[5] Plaintiffs bear the burden of demonstrating that the mortgagee failed to comply with the power of sale.[6] They may not rely on general allegations but must assert specific failures of compliance in the foreclosure process that support rescission of the sale.[7]

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[3] The allegations in the Complaint are vague and scattershot. Defendants have grouped them together into what they believe are similar claims for the convenience of the Court.

The Complaint does not come close to meeting these heavy burdens. Instead, Plaintiffs make a series of unconnected legal assertions, which are inconsistent with Rhode Island law, or the documents they signed, or both. This Court should accordingly find that the foreclosure complied with Rhode Island law and dismiss the Complaint for failure to state a claim.

1. Rhode Island Law Authorized BONY To Foreclose.

As discussed above, MERS assigned its interest as mortgagee to BONY prior to the foreclosure sale, and BONY thereafter foreclosed as mortgagee, as permitted by Rhode Island law. Plaintiffs challenge BONY's power to foreclose on two grounds – but the Rhode island Supreme Court has rejected both arguments.

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[4] *140 Reservoir Ave. Assocs. v. Sepe Invests., LLC*, 941 A.2d 805, 811-812 (R.I. 2007) (a foreclosure conducted by statutory power of sale "shall forever be a perpetual bar against the mortgagor"); *Holden v. Salvadore*, 964 A.2d 508, 516 (R.I. 2009) (same); *see also Branch Ave Capital, LLC v. U.S. Bank Nat'l Ass'n,* 2013 WL 5242121, *3-4 (D. Mass. Sept. 16, 2013) (mortgagee must have acted "in bad faith" in failing to meet notice obligations "sufficient to protect the mortgagor's interest under the given circumstances" in a foreclosure sale for the sale to be commercially unreasonable).

[5] *Ingram v. Mortg. Elec. Registration Sys.*, 2012 R.I. Super. LEXIS 77, at *11-12 (R.I. Super. Ct. May 17, 2012) (purchasing mortgagee is presumed to have valid title after properly-conducted foreclosure sale); *Noury v. Deutsche Bank Nat'l Trust Co.*, 2012 R.I. Super. LEXIS 74, at *9-10 (R.I. Super. Ct. May 7, 2012) (same); *Deutsche Bank v. Falconer*, 2012 R.I. Super. LEXIS 90, at *14-15 (R.I. Super. Ct. May 1, 2012) (same).

[6] *See* Footnote 4 *supra*.

[7] *Estrella v. Mortg. Elec. Registration Sys.*, 2012 R.I. Super. LEXIS 108, at *7 (R.I. Super. Ct. Jul. 10, 2012) ("Plaintiff must prove as a matter of law, and to the satisfaction of the Court, that she has a legal right to rescission of the foreclosure sale and the return of title to the Property").

a. *Bucci* Held That The Mortgagee's Assignee May Foreclose.

Plaintiffs first claim that MERS cannot invoke the power of sale because it is not the Lender. Compl. ¶¶ 32, 35. The Rhode Island Supreme Court rejected this argument in *Bucci v. Lehman Brothers Bank, FSB*, 68 A.3d 1069 (R.I. 2013), holding that a mortgagee, acting in a nominee capacity for the noteholder, is empowered to invoke the power of sale on the noteholder's behalf. The mortgage in *Bucci* and the Mortgage at issue here contain the same language explicitly conveying to MERS and its assigns the power to invoke the power of sale:

> Borrower does hereby mortgage, grant and convey to MERS (solely as nominee for Lender and Lender's successors and assigns) ***and to the successors and assigns of MERS***, with Mortgage Covenants upon the Statutory Condition and with the Statutory Power of Sale, the [mortgaged] property … .
>
> Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and ***Lender's successors and assigns***) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property... .

Compare Bucci, 68 A.3d at 1081 *with* Mortgage at p. 3 (emphasis added).

The *Bucci* Court found that this language demonstrates that MERS "acting in a nominee capacity for the owner of the note, can be a 'mortgagee' as that term is used in § 34-11-22," and "has the contractual authority to exercise [the right to foreclose]." *Id.* at 1081, 1084. *Bucci* made clear that that the nonjudicial foreclosure process generally—including the right to invoke the power of sale—is contractual. *Id.* Finally, *Bucci* addressed—and explicitly rejected—Plaintiffs' argument that only the original lender has authority to foreclose, reasoning that just because the mortgage grants the original lender the ability to invoke the power of sale does not negate the contractual grant of authority to MERS and its assigns to do the same. *See id.* at 1081.

Rhode Island law thus forecloses Plaintiffs' allegation that BONY could not foreclose because only the original lender could do so. Indeed, multiple Rhode Island courts so held before *Bucci* was issued.[8]

b. The Foreclosing Party Need Not Hold The Note Under Rhode Island Law.

Plaintiffs also claim that BONY could not invoke the power of sale because it "does not possess the promissory note" and that the note is no longer recognized as an "asset or account receivable" of any Defendant. Compl. ¶¶ 56, 59-61.[9] *Bucci* rejected this argument too:

> "[W]e do not conclude that a foreclosing mortgagee must have physical possession of the mortgage note in order to effect a valid foreclosure. There is no applicable statutory language suggesting that the Legislature intended to proscribe application of general agency principles in the context of mortgage foreclosure sales. Accordingly, we interpret [Massachusetts foreclosure law] to permit one who, although not the note holder himself, acts as the authorized agent of the note holder, to stand 'in the shoes' of the 'mortgagee' as the term is used in these provisions." … [W]e interpret the term "mortgagee" in our statutes in a similar fashion as did the Supreme Judicial Court of Massachusetts.

Id. at 1086-87 (*quoting Eaton v. Fed. Nat'l Mortg. Ass'n*, 969 N.E.2d 1118, 1131 (Mass. 2012)).

This Court has also recognized that *Bucci* precludes Plaintiffs' argument:

> [T]he MERS framework, which customarily separates the legal interest from the beneficial interest, corresponds with longstanding common-law principles regarding mortgages [and] there is no reason to doubt the legitimacy of the common arrangement whereby MERS holds bare legal title as mortgagee of record and the noteholder alone enjoys the beneficial interests in the loan.

In re Mortg. Foreclosure Cases, 2013 WL 4735638, at *3 (D.R.I. Sept. 3, 2013).

2. The Original Lender Did Not Need To Exercise The Power Of Sale.

Plaintiffs contend that Greenpoint —Plaintiffs' original lender—did not properly invoke the power of sale because it did not provide the Plaintiffs with a notice of sale or publish the

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8 *See, e.g., Kriegel v. Mortg. Elec. Registration Sys.*, 2011 WL 4947398 (R.I. Super. Ct. Oct. 13, 2011); *Payette v. Mortg. Elec. Registration Sys.*, 2011 WL 3794700 (R.I. Super. Ct. Aug. 22, 2011); *Porter v. First NLC Fin. Servs., LLC*, 2011 WL 1251246 (R.I. Super. Ct. Mar. 31, 2011); *Bucci*, 2009 WL 3328373.

9 Plaintiffs also alleges that BONY, the noteholder, lacked standing to foreclose. Compl. ¶ 49. But, as *Bucci* makes clear, just as the mortgagee may foreclose on the noteholder's behalf, so too may BONY as noteholder authorize foreclosure on its own behalf.

notice of sale as required by Rhode Island foreclosure law. Compl. ¶¶ 32-34. Similarly, the Complaint alleges that the note was "never specially endorsed" to BONY. *Id.* ¶ 57. However, MERS, as nominee for the lender and as mortgagee assigned its interest in the Mortgage to BONY prior to foreclosure (Assignment of Mortgage), and thus whether Greenpoint properly invoked the power of sale, or how (or if) the note was endorsed to BONY, is irrelevant under Rhode Island law.

B. The Assignment Of The Mortgage Complied With Rhode Island Law.

Plaintiffs also challenge the assignment[10] by MERS of its legal interest in the Mortgage as mortgagee to BONY. Rhode Island law again precludes their arguments.

1. **Bucci** ***And This Court Have Held That MERS Can Serve As Mortgagee And Assign Mortgages.***

Plaintiffs allege MERS cannot serve as mortgagee or assign a mortgage both because MERS is not the Lender on the Note secured by his Mortgage and because MERS does not hold the Note. Compl. ¶¶ 22-25. It is well-established, however, that MERS can serve as mortgagee. A mortgage is a contract like any other, and the lender and the borrower can agree to appoint another entity to serve as mortgagee. *Bucci* squarely addressed the ability of parties to a mortgage contract to name MERS, or any other entity, as mortgagee and agent for the lender to hold legal title to the mortgage securing the mortgagee's debt:

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[10] Rhode Island courts have consistently held that a plaintiff who is not a party to an assignment lacks standing to challenge it. *See, e.g., Akalarian v. Nation One Mortg. Co., Inc.*, 2013 WL 3971148 (R.I. Super. Ct. July 29, 2013); *Bank of New York Mellon v. Cuevas*, 2012 WL 1388716 (R.I. Super. Ct. Apr. 19, 2013); *Rutter*, 2012 WL 894012, at *10; *Kriegel*, 2011 WL 4947398; *Payette*, 2011 WL 3794700. Defendants thus believe that the Court should dismiss the claims in the Complaint concerning the mortgage assignment because Plaintiffs lack standing to challenge it.

However, on November 5, 2013, this Court concluded that a borrower has standing under Rhode Island law, in certain circumstances, to challenge an assignment of mortgage to which he is neither a party nor a beneficiary. *Cosajay v. Mortg. Elec. Registration Sys., Inc.,* Civ. Act. No. 10-442-M, slip op. at 4-9 (D.R.I. Nov. 5, 2013). Accordingly, Defendants hereby expressly preserve their standing argument in the event that the Court later reaches a different conclusion on this issue, or if an appeal is later filed in this matter at a later date.

> This Court has recognized that, in such private transactions, competent persons shall have the utmost liberty of contracting and that their agreements voluntarily and fairly made shall be held valid and enforced in the courts[ ] unless a violation of the law or public policy is *clear and certain*. In our opinion, the designation of MERS as grantee of the mortgage, as nominee for the lender, was not a clear and certain violation of § 34–11–22.

68 A.3d at 1085 (emphasis in original) (citations omitted). Here, the Mortgage, which was executed by Plaintiffs, clearly states that "MERS is the mortgagee under this Security Instrument." Mortgage at p. 1. Based on the same contractual language, the *Bucci* court found that "MERS is the mortgagee because the Mortgage executed by plaintiffs so states and the fact that MERS acts in a nominee capacity for the lender … does not diminish MERS's role as mortgagee." *Bucci*, 68 A.3d at 1085 (quotations omitted). MERS, therefore, is "the lawful and contractually designated mortgagee and nominee for the lender/noteholder." *In re Mortg. Foreclosure Cases*, 2013 WL 4735638, at *2 n.4.

Moreover, there is no requirement under the law that the mortgagee be the lender or hold the note.[11] MERS, "acting in a nominee capacity for the owner of the note, can be a 'mortgagee' as that term is used in § 34-11-22." *Bucci*, 68 A.3d at 1084; *In re Mortg. Foreclosure Cases*, 2013 WL 4735638, at *2-3 ("there is no reason to doubt the legitimacy of the common arrangement whereby MERS holds bare legal title as mortgagee of record and the noteholder alone enjoys the beneficial interest in the loan") (citing *Culhane v. Aurora Loan Servs.*, 708 F.3d 282, 292 (1st Cir. 2013) ("The law contemplates distinctions between the legal interest in a mortgage and the beneficial interest in the underlying debt. These are distinct interests, and they may be held by different parties.")).

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[11] Rhode Island courts have long recognized that a mortgage may be held by an entity other than the note holder or owner of the secured debt. The cases pre-date the advent of MERS by half a century. *E.g., Walsh v. Morgan*, 198 A. 555, 558 (R.I. 1938) ("the money which was loaned to Michael J. Walsh, and for which the note in question was made, was the money of Dorsey, who was the brother of Mary Coyle … Dorsey retained the note … Mary Coyle in her lifetime held the legal title only to the mortgage and that a trust resulted in favor of Thomas Dorsey, who paid the consideration for the mortgage which was in the name of Mary Coyle. […] Dorsey was the equitable owner of the note and mortgage, Mary Coyle having only a bare legal title"); *Allen v. Robbins*, 7 R.I. 33, 39 (1861) (where the mortgagee held legal title to the mortgage on behalf of eight note holders, each of which note was secured by the property, the court held that "[t]he defendant, Robbins, though he held the mortgage in trust for the holders of the bills of exchange secured by it, and was to them as a trustee in the strictness of that term, yet, as to the owner of the equity of redemption, and in so far as he held the estate as security for the debts, he held the relation of mortgagee only; standing precisely in the condition of the holders of those debts, whose trustee he is."); *Waterman v. Hunt*, 2 R.I. 298, 304 (1852) ("Mr. Chandler,

It follows, as this Court has observed, that MERS, as mortgagee, can assign its legal interest in a mortgage under Rhode Island law without originating the mortgage and note or holding the note. *In re Mortg. Foreclosure Cases*, 2013 WL 4735638, at *2 n.4 ("While the *Bucci* decision did not address the specific issue of MERS's authority to assign a mortgage, it follows from the reasoning in *Bucci* that MERS … may also lawfully assign its interest in a mortgage.") (quoting *Akalarian*, 2013 WL 3971148, at *3).[12]

Where the holder of legal title to the mortgage acts as "agent of the owner of the equitable title," *i.e.,* the lender and its successors and assigns, the note and the equitable interest in the mortgage remain unified. *Bucci*, 68 A.3d at 1088. "[T]his transactional structure is consistent with the law of this state." *Id.* Hence the holder of *legal* title (*i.e.,* the lender's nominee) "may be denominated as the mortgagee … and may foreclose on behalf of the [equitable title holder, *i.e.,* the] note owner." *Id.* The "designation [of a] nominee under the mortgage, albeit as the holder of legal title only, does not proscribe its authority to exercise the

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when he received the note, did not take any assignment of the mortgage, but he is equally entitled to the benefit of the mortgage security to the extent of his debt.").

[12] *See also Bucci*, 68 A.3d at 1087 ("[A]ny of the obligations placed upon a 'mortgagee' may be fulfilled by either the mortgage holder or the owner of the note"); *Cuevas*, 2012 WL 1388716 ("[T]he identity of the note-holder at the commencement of the foreclosure proceedings is irrelevant because the mortgagee . . . acts as nominee of the current note-holder.").

power of sale under the provisions of § 34-11-22." *Id.* at 1085.

Rhode Island law thus rejects Plaintiffs' suggestion that MERS may serve as mortgagee and assign the mortgage as nominee of the lender.

2. The Assignment Is Not Void Under The Recording Statute.

Plaintiffs' claim that the assignment is "void pursuant to R.I.G.L. § 34-11-1" (Compl. ¶ 25) is meritless. Rhode Island General Law § 34-11-1 provides that "[e]very conveyance of lands, tenements or hereditament absolutely, by way of mortgage … shall be void unless made in writing duly signed, acknowledged as hereinafter provided, delivered, and recorded in the records of land evidence in the town or city where the lands, tenements or hereditaments are situated." Here, the assignment was duly executed and recorded in Providence, Rhode Island on July 16, 2009 (Assignment of Mortgage), and thus it "therefore is presumptively valid." *Hoecke v. First Franklin Financial Corp.*, 2013 WL 1088825, at *4 (R.I. Super. Ct. Mar. 7, 2013).

3. The Assignment Was Properly Executed.

Finally, Plaintiffs claim that, because the Assignment was signed by an attorney who was not a MERS employee, the assignment was invalid. Compl. ¶¶ 12-16, 21. This claim fails as a matter of general corporate law and Rhode Island law concerning executed instruments, and has been repeatedly rejected by courts around the country.

As a Delaware corporation, Delaware law governs MERS' appointment of officers. *BBS Norwalk One, Inc. v. Raccolta, Inc.*, 60 F. Supp. 2d 123, 129 (S.D.N.Y. 1999), *aff'd*, 205 F.3d 1321 (2d Cir. 2000). Under Delaware law, a corporation may appoint officers to carry out the corporation's business. Del. Code Ann. tit. 8, §§ 122, 142. A corporation's officers need not be employees of the corporation, and individuals can simultaneously be officers of more than one corporation. *Haft v. Dart Group Corp.*, 841 F. Supp. 549, 572 (D. Del. 1993); *Craig v. Graphic Arts Studio, Inc.*, 166 A.2d 444, 445 (Del. Ch. 1960). The assignment from MERS to BONY was executed by Francis J. Nolan, pursuant to a corporate resolution which appointed him as a certifying officer of MERS and which was filed in the land records along with the assignment. Compl. ¶¶ 12-13, 19-20 & Assignment of Mortgage.

This Court has held that MERS may appoint corporate officers to execute assignments of mortgages and other documents in precisely this manner:

> With regard to Plaintiffs' argument that an assignment is invalid if signed by an unauthorized individual … with a false title of vice president, the First Circuit emphasized in *Culhane* that the statute neither places restrictions on who may be elected as an officer of the assignor nor imposes special requirements (say, regular employment) on who may serve as a vice president of an assignor corporation. As such, while MERS's practice of appointing employees of member firms as certifying officers can be disparaged on policy grounds, such policy judgments are for the legislature, not the courts.

In re Mortg. Foreclosure Cases, 2013 WL 4735638, at *3. Courts around the country have done the same.[13] Delaware corporate law principles reject Plaintiffs' argument.

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[13] *See Culhane,* 708 F.3d at 294 (suggestion that designation of loan servicer employee as "vice president of MERS … undermine[d] the legitimacy of [employee's] status as a certifying officer" to be "little more than wishful thinking"); *Kiah v. Aurora Loan Servs., LLC,* 2011 WL 841282, at *6-7 (D. Mass. Mar. 4, 2011) (finding argument that "MERS' signing officer, Theodore Schultz, lacked signatory authority" to be "without merit. …Defendants have submitted a MERS 'Corporate Resolution' that predates the assignment and grants such authority to an 'attached list of candidates,' including Schultz. This is confirmed by the fact that MERS, a defendant in this case, does not contest the assignment"); *Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1040 (9th Cir. 2011) ("MERS relies on its members to have someone on their own staff become a MERS officer with the authority to sign documents on behalf of MERS. As a result, most of the actions taken in MERS's own name are carried out by staff at the companies that sell and buy the beneficial interest in the loans."); *Silving v. Wells Fargo Bank, N.A.,* 2012 WL 135989, at *6 (D. Ariz. Jan. 18, 2012); *Jackman v. Hasty,* 2011 WL 5599075, at *3 (N.D. Ga. Nov. 15, 2011); *U.S. Bank, N.A. v. Willis,* 2011 WL 3704428, at *3 (N.D. Ill. Aug 22, 2011); *Chua v. IB Prop. Holdings, LLC,* 2011 WL 3322884, at *2 (C.D. Cal. Aug. 1, 2011) ("[T]o the extent that Plaintiffs take issue with [MERS certifying officer] Lisa Markham's dual position, Plaintiffs have not identified a relevant legal authority prohibiting one individual from working for both CitiMortgage and MERS or from acting as an agent for both."); *Phillips v. Wells Fargo Bank, N.A.*, 2009 WL 3756698, at *4 (S.D. Cal. Nov. 6, 2009) (allegation that "the assignment was signed by an unauthorized party because 'Scott Anderson was not and is not a Vice President of MERS'" was a "conclusory allegation[] of fact that do[es] not raise a right to relief above the speculative level").

Plaintiffs' argument also fails under Rhode Island law. Thus:

> Where an instrument of a private corporation appears in the chain of title, and the instrument is executed and acknowledged in proper form, it may be assumed that the persons executing the instrument were the officers they purported to be, and that such officers were authorized to execute the instrument on behalf of the corporation.

Rhode Island Title Standard No. 5.3 (Exhibit D hereto).[14] Here, the assignment (1) was recorded in the chain of title; and (2) was executed and acknowledged by a notary public with seal affixed, and so Mr. Nolan is presumed to have authority to execute the document – and the Complaint offers nothing to rebut that presumption. *Cafua v. Mortg. Elec. Registration Sys.*, 2012 WL 2377404 (R.I. Super. Ct. June 20, 2012) ("Moreover, as a matter of [Rhode Island] law, the assignment is presumptively valid"); *Hoecke*, 2013 WL 1088825, at *4 (where "the assignment of the Mortgage interest was executed by an individual who represented to a Notary Public that she was an employee of MERS and that she was authorized to execute the assignment on behalf of MERS…the assignment conforms to the statutory form of assignments of a mortgage interest as set forth in § 34-11-12"); *Dolan v. Hughes*, 40 A. 344 (R.I. 1898) (the presumption of law is in favor of the validity of the assignment, and of the good faith of the transaction thereunder; and they must be proved to have been fraudulently made before the court can decide against them).[15]

C. The Security Instruments Are Valid Under Rhode Island Law.

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[14] Title Standard No. 5.3 is "persuasive" authority in Rhode Island courts. *Southwick v. Mortg. Elec. Registration Sys., Inc.*, 2013 R.I. Super. LEXIS 61, *11 n.4 (R.I. Super. Ct. Apr. 5, 2013). *See also In re Varrichione*, 354 B.R. 563, 571-72 (Bankr. D. Mass. 2006) (relying on Real Estate Bar Ass'n Title Standard 38); *Drowne v. Balerna*, 65 Mass. App. Ct. 1115, 2006 WL 240274, at *3 (Feb. 1. 2006) (relying on Real Estate Bar Ass'n Title Standard 23 in affirming issuance of preliminary injunction).

[15] Even if Mr. Nolan lacked authority, the assignment is not void under Rhode Island law, but only *voidable*, at the election of *the assignor*. *Cruickshank v. Griswold*, 104 A.2d 551, 552 (R.I. 1954); *Columbian Nat'l Life Ins. Co. v. Industrial Trust Co*, 190 A. 13, 19 (R.I. 1937); *Fleming v. Hanley*, 42 A. 520, 521 (R.I. 1899). MERS, a party to this case, has not voided the assignment.

The Complaint next seeks to challenge the validity of the Mortgage and Note. These arguments go nowhere under Rhode Island law.

1. MERS Mortgages Are Valid In Rhode Island.

Plaintiffs allege that the Mortgage is "unsecured." Compl. ¶ 62. This is nonsensical for two reasons. First, a mortgage is used to secure repayment of the obligations in a note, and so a mortgage cannot be unsecured. Second, the statute cited does not mention mortgages at all.

Plaintiffs may be arguing that use of MERS as mortgagee somehow invalidates a mortgage. The Rhode Island Supreme Court addressed this issue at length in *Bucci*. There too, plaintiffs-appellants relied on the hoary principle that the mortgage and note are inseparable, and decried MERS's holding the mortgage but not the note as destructive of the validity of both instruments. 68 A.3d at 1086-87. Yet the Supreme Court explained:

> MERS, as nominee, stands in the shoes of the note owner with respect to the mortgage such that there is no separation. … [T]he holder of the legal title to the mortgage –MERS– always has acted as an agent of the owner of the equitable title. In our opinion, this transactional structure is consistent with the law of this state. … MERS, as the holder of legal title, may be dominated as the mortgagee in the mortgage and may foreclose on behalf of the note owner.

Id. at 1087-88. The Supreme Court went on to urge that "[c]ourts should be vigorous in seeking to find such [an agency] relationship, since the result is otherwise likely to be a windfall for the mortgagor and the frustration of the [the note owners]'s expectation of security." *Id.* at 1089 (quoting Restatement (Third) Property § 5.4, cmt. *e.* at 385).[16]

Here, Plaintiffs expressly agreed in the mortgage contract that MERS is "nominee for Lender and Lender's successors and assigns" and "is the mortgagee under this Security Instrument." Mortgage at p. 1. They cannot now claim that the mortgage was invalid, and seek to overturn the foreclosure sale, because MERS was the mortgagee.[17]

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[16] *See* footnote 11 *supra*.

2. The Mortgage Is Not Void Under the Recording Statute.

Plaintiffs also challenge their Mortgage on the basis that it is "void pursuant to R.I.G.L. 34-11-1." Compl. ¶ 64.[18] R.I. Gen. Laws § 34-11-1 states in relevant part:

> Every conveyance of lands, tenements or hereditament absolutely, by way of mortgage … shall be void unless made in writing duly signed, acknowledged as hereinafter provided, delivered, and recorded in the records of land evidence in the town or city where the lands, tenements or hereditaments are situated; provided, however, that the conveyance, if delivered, as between the parties and their heirs, and as against those taking by gift or devise, or those having notice thereof, *shall be valid and binding though not acknowledged or recorded*.

§ 34-11-1 (2011) (emphasis added). This amounts to an argument that the mortgage is void because it was not recorded, and it fails for at least two reasons. For one, the Mortgage *was* recorded. Mortgage at p. 1 (showing recording book and page stamps at the top center of the page). For another, even were it not, § 34-11-1 states that the mortgage "shall be valid and binding though not acknowledged or recorded" if delivered "as between the parties and their heirs, and as against those taking by gift or devise, or those having notice thereof." As the Complaint does not allege, for obvious reasons, that Plaintiffs had no notice of the Mortgage they executed, it is not void under § 34-11-1.

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[17] *Payette*, 2011 WL 3794700 ("Plaintiffs further contend that IndyMac's initial assignment of the Mortgage to MERS disconnected the Note and Mortgage, leaving both obligations invalid at their inception…. The Court disagrees."); *Rutter*, 2012 WL 894012 (Rhode Island law "does not require the Note and Mortgage be held by the same entity, at the time of foreclosure or at the time MERS assigns the Mortgage to another entity."); *Jimenez v. People's Choice Home Loan, Inc.*, 2012 R.I. Super. LEXIS 107, at *16 (R.I. Super. Ct. July 10, 2012) ("Plaintiff's argument that the mortgagee and lender must be the same party under Rhode Island statutory law fails to state a claim for relief."); *Cafua*, 2012 WL 2377404, at *2-3 (rejecting plaintiff's argument that "under Rhode Island law the mortgagee and note-holder must be one in the same."); *Cooke v. Mortg. Elec. Registration Sys., Inc.*, 2012 R.I. Super. LEXIS 137, at *16 (R.I. Super. Ct. Aug. 29, 2012) ("The assertion by Plaintiffs that [Rhode Island law] require[s] the note holder and mortgagee to be the same party is erroneous."); *Porter*, 2011 WL 1251246 ("whatever financial entity currently holds the beneficial interest of the Note, MERS is designated the nominee for the current beneficial owner of the Note based upon the broad language contained in the Mortgage Agreement."); *O'Brien v. Mortg. Elec. Registration Sys., Inc.*, 2012 R.I. Super. LEXIS 84, at *12-13 (R.I. Super. Ct. June 4, 2012) ("the Mortgage instrument expressly permitted [] assignment of the Mortgage interest by MERS and [] authority was specifically approved by the mortgagor … [a]ccordingly, MERS had the authority to assign the Mortgage interest to Deutsche Bank …."); *Rosano v. MERS*, 2012 R.I. Super. LEXIS 95, at *10 (R.I. Super. Ct. June 19, 2012) ("Plaintiff's averments … overlook the previous holdings of this Court that MERS may assign the Mortgage interest as 'permitted by the unambiguous language' contained in the Mortgage instrument."); *Scarcello v. Mortg. Elec. Registration Sys., Inc.*, 2012 R.I. Super. LEXIS 103, at *12 (R.I. Super. Ct. June 26, 2012) ("[t]he identity of the note holder is irrelevant as it is well established under current Rhode Island law that MERS and the assignees of MERS, in this case Aurora, act a nominee of the current note holder."); *Kriegel*, 2011 WL 4947398, at *6 (rejecting claim that use of MERS split the note from the mortgage and rendered both unenforceable).

[18] As addressed in Section I.B.2, Plaintiffs also unsuccessfully challenge the assignment of the Mortgage under R.I. Gen. Laws. § 34-11-1. Compl. ¶ 25.

3. The Mortgage And the Note Are Not Void Due to Fraud.

The Complaint next challenges the foreclosure on the basis that the Mortgage and the Note are void due to "fraud." Compl. ¶¶ 63, 65. "[W]here a party alleges fraud, he or she must plead these claims with particularity with regard to the circumstances and nature of the fraud." *Schofield v. U.S. Bank N.A.*, 2012 WL 3011759, at *2 (D.R.I. July 23, 2012) (McConnell, J.) (dismissing claims related to non-judicial foreclosure).[19] Here, the Complaint does not allege why a fraud occurred, how the fraud occurred, when the fraud occurred, or any other details of the supposed fraud. Courts regularly hold that such naked allegations cannot be used to overturn a completed foreclosure sale.[20]

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[19] *Hill v. Gonzani*, 638 F.3d 40, 55 (1st Cir. 2011) ("As with all allegations of fraud, a plaintiff must plead the circumstance of the fraud with particularity, pursuant to Rule 9(b)")); *see also Akalarian*, 2013 WL 3971148, at *5 (fraud claim in foreclosure suit "not viable"; "Plaintiff failed to properly allege the essential elements of fraud – that an intentional misrepresentation was made by Defendants, which misrepresentation she relied on, causing her damage" and "Plaintiff's Complaint fails to allege fraud with the particularity required by R.I. [Super.] R. Civ. P. 9(b).").

[20] *Nash v. GMAC Mortg., LLC*, 2011 WL 2470645, at *10 (D.R.I. May 18, 2011) (generic fraud allegation about foreclosure "fails to identify any actual misrepresentations of fact made to her by GMAC, let alone identify who issued a false statement, when, and to whom. Nor does she allege that she relied to her detriment on any alleged false statements made by GMAC"), *adopted*, *Nash v. GMAC Mortg., LLC*, 2011 WL 2469849, at *1 (D.R.I. June 20, 2011); *Colbert v. Fed. Nat'l Mortg. Ass'n*, 2013 WL 1629305, at *9 (E.D. Mich. April 16, 2013) ("[A] strong

D. Plaintiffs' Miscellaneous Allegations Are Meritless.

Finally, the Complaint includes a series of bald, conclusory, and boilerplate allegations that their counsel has made in hundreds of other complaints in this Court, including:

- the assignment "is fatally flawed" under R.I. Gen. Laws. § 34-11-24 (Compl. ¶ 27);
- "any foreclosure relative to this property must be done judicially and not by way of advertisement and auction due to failure to exactly follow the letter of the law" (Compl.¶ 51); and
- "the note is current or has been satisfied by Plaintiff or another third party" (Compl. ¶ 54).

The Complaint does not plead any specific facts to support or explain these threadbare allegations, and Plaintiffs' counsel recently was sanctioned by the Rhode Island Superior Court for making similar allegations in pleadings without having conducted a reasonable inquiry into their truth.[21] Plaintiffs' counsel was also recently sanctioned by this Court for "fil[ing] factually inaccurate pleadings with this Court."[22] Defendants do not request that sanction here, but instead note that under the Federal Rules these unadorned legal assertions do not preclude dismissal because courts shall "give *no weight* to 'bald assertions, unsupportable conclusions, and opprobrious epithets.'" *Arruda v. Sears, Roebuck & Co.*, 310 F.3d 13, 18 (1st Cir. 2002) (affirming dismissal of allegations that redemption agreements were efforts to collect discharged

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showing of fraud or irregularity [is required] to set aside a completed foreclosure sale once the redemption period has expired"); *Kissi v. EMC Mortg. Corp.*, 627 F. Supp. 2d 27, 29, 34 (D.D.C. 2009) (dismissing generic allegation that defendants foreclosed "through fraud and misrepresentation" because "[a]bsent allegations as to the time, place and content of defendants' allegedly false representations or fraudulent acts, the fraud claim has been inadequately pled and fails to survive the motion to dismiss").

[21] *See* Transcript of Proceedings, *O'Brien v. Mortg. Elec. Registration Sys., Inc.*, No. KC/2011-0972, at pp. 12-13, 27-29 (R.I. Super. Ct. Sept. 17, 2013) (Exhibit E hereto).

[22] Order on Motion for Reconsideration, No. 11-mc-88-M, at p. 4 (D.R.I. Nov. 21, 2013) (ECF No. 2276).

debts) (emphasis added); *see also Natal v. Christian and Missionary Alliance,* 878 F.2d 1575, 1578 (1st Cir. 1989) ("vague averment" that defendant asked plaintiff "to evict the building, causing losses to the business and mental anguish to her" cannot support claim; "[e]mpty generalities will not suffice … [t]o permit Padilla to drag CMA over the pleading threshold by virtue of so grazing an impingence as the single oblique reference contained in the instant complaint would open floodgates best kept shut"); *Dartmouth Review v. Dartmouth College,* 889 F.2d 13, 16 (1st Cir. 1989) (affirming dismissal because, in presenting their allegations, "plaintiffs must point, if not to fire, at least to some still-warm embers; 'smoke alone is not enough to force the defendants to a trial.'"); *Resolution Trust Corp. v. Driscoll,* 985 F.2d 44, 48 (1st Cir. 1993) ("one conclusory sentence" regarding claim that defendant assumed debt obligation was insufficient to avoid dismissal where nothing "remotely suggests the factual basis for this claim"; "[f]actual allegations in a complaint are assumed to be true when a court is passing upon a motion to dismiss, but this tolerance does not extend to legal conclusion, or to bald assertions.") (internal citations omitted).[23]

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[23] Plaintiffs' allegations fail to state a claim in any event. Thus, Plaintiffs allege that "[t]he 'Assignment' is fatally flawed in its execution and effect by virtue of the fact that is [*sic*] was not assigned by the mortgagee as required by **General Laws of Rhode Island at §34-11-24.**" (Compl. ¶ 27). Section 34-11-24 requires no such thing; rather, it provides merely that an assignment of the mortgage has the effect of transferring all powers of the mortgagee under the mortgage to the assignee. *Kosiba v. Mortg. Elec. Registration Sys., Inc.*, 2012 R.I. Super. LEXIS 98, at *14-15 (R.I. Super. Ct. June 25, 2012) ("assignee steps into the shoes of the assignor and can avail itself of the assignor's rights."). In other words, the section sets forth only the *legal effect* of a valid mortgage assignment, and does not prescribe what makes an assignment valid or *who* is a valid assignor.

The Complaint alleges that the foreclosure of the Property, under the circumstances of this case, "must be done judicially[.]" (Compl. ¶ 51). In Rhode Island, judicial foreclosure is only used at the *lender's* option, where the mortgage contract contains no power of sale clause. *See* R.I. Gen. Laws. §§ 34-27-1 *et seq.*, 34-11-22 (codifying statutory power of sale); *see also Hoecke*, 2013 WL 1088825, at *4-5 (loan servicer may conduct non-judicial foreclosure sale).

Regarding Plaintiffs' allegation that the note is current or has been satisfied (Compl. ¶ 54), see Section II *infra.*

II. THE COURT SHOULD ALSO DISMISS THE COMPLAINT BECAUSE PLAINTIFF FAILED TO ALLEGE TENDER OR OFFER OF TENDER.

Independently, Rhode Island's tender rule requires that the Court dismiss the Complaint.

Because interference with a statutorily-mandated foreclosure proceeding is equitable in nature, a borrower may not seek to challenge foreclosure proceedings if they have "made no tender or offer of payment" of amounts due under the loan. *Hanley v. Brayton*, 17 A.2d 857, 860 (R.I. 1941). Here, Plaintiffs seek to challenge foreclosure proceedings, but they do not offer to pay any amounts due, nor assert that they are even able to make such payments. They are therefore "hardly in a position to ask for equity." *Id.*; *see McQuiddy v. Ware*, 87 U.S. 14, 19 (1873) ("he who seeks equity must do equity"); *accord Homeyer v. Bank of America, NA*, 2012 WL 4105132, at *6 (D. Idaho Aug. 27, 2012) ("The tender rule has been applied in quiet title suits seeking equitable relief for almost 100 years.").[24]

Plaintiffs vaguely assert that "[t]he note is current or has been satisfied by another third party" (Compl. ¶ 54), but that rote assertion does not forestall dismissal for two reasons. First, the Complaint does not provide any factual basis or documentation to show that Plaintiffs made regular payments when due on the loan, or to show what "third party" satisfied the loan or when it was satisfied – information that would be uniquely within Plaintiffs' knowledge. And the Court should also disregard the allegation because it is implausible: as shown above, Plaintiffs were sent a notice of default informing them that they were in default in loan payments, and could cure the deficiency – yet they took no action and the property was sold at foreclosure. Courts have rejected similarly-vague and similarly-implausible assertions in these circumstances, and the same result is required here. *Cosajay v. Mortg. Elec. Registration Sys., Inc.*, 2011 U.S. Dist. LEXIS 151361, at *42-43 (D.R.I. June 23, 2011) (*citing Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555 (2007)) ("With respect to Plaintiff's speculation … that her loan has been paid in full, factual allegations must be enough to raise a right to relief above a speculative level"); *see also Scarcello,* 2012 R.I. Super. LEXIS 103, at *10-11 (conclusory, speculative allegations insufficient to raise right to relief above speculative level); *Jimenez*, 2012 R.I. Super. LEXIS 107 (same); *Schayes v. Orion Financial Group, Inc.,* 2011 WL 3156303, at *4 (D. Ariz. July 27, 2011) ("Speculation [that the note was satisfied] is not enough, … especially naked speculation of this variety").

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[24] *See also Schuck v. Fed. Nat'l Mortg. Ass'n*, 2011 WL 2580552, at *2 (E.D. Cal. June 28, 2011) ("a plaintiff cannot set aside a foreclosure sale without pleading tender or the ability to offer tender"); *Pimentel v. Countrywide Home Loans, Inc.*, 2011 WL 2619093, at *2 (D. Nev. July 1, 2011) (denying temporary restraining order; borrower in default); *White v. BAC Home Loans Servicing, LP*, 2010 WL 4352711, at *5 (N.D. Tex. Nov. 2, 2010) ("to the extent [plaintiff] seeks equitable relief to avoid foreclosure, he cannot state a claim for such relief because he has not tendered the amount due on the loan"); *Cagle v. Carlson*, 705 P.2d 1343, 1345 (Ariz. Ct. App. 1985) (tender is "a condition precedent to the setting aside of the sale" because the borrower "is both legally and morally indebted" to the lender under the parties' loan contract).

Because Plaintiffs have not tendered the disputed amounts at issue, nor properly alleged that they have done so, have offered to do so, or are able to do so, Rhode Island law bars Plaintiffs from challenging the foreclosure proceeding. This provides another ground for dismissal.

III. THE COURT SHOULD DISMISS THE COMPLAINT BECAUSE IT FAILS TO STATE A COGNIZABLE CLAIM FOR RELIEF UNDER RHODE ISLAND LAW.

Finally, the Court can and should dismiss the Complaint because none of the causes of action states a cognizable claim for relief under Rhode Island law.

Count I, captioned "Declaratory Judgment," seeks a declaration that "Robert S. Berrillo and Jane M. Berrillo owns [sic] the subject property" and that the foreclosure sale is void. Compl. ¶¶ 67-68; *see also* ¶¶ 52-53. The Declaratory Judgment Act (28 U.S.C. § 2201) provides only a *remedy,* however, not a substantive cause of action, *Buck v. American Airlines, Inc.,* 476

F.3d 29, 33 (1st Cir. 2007), and Count I must therefore be dismissed for this reason alone. In addition, declaratory relief is derivative and is not available if the plaintiff lacks a valid claim against the defendant.[25] As shown above, the foreclosure proceedings complied fully with Rhode Island law, and so the request for a declaration in Count I falls along with Plaintiffs' substantive claims.

Likewise, Count II seeking to quiet title in Plaintiffs' favor also fails to state a cognizable claim. As demonstrated above, Rhode Island law and the loan documents Plaintiffs executed authorize the foreclosure proceedings that occurred after his default, and the Complaint asserts no valid legal basis to challenge the sale, and so there is no ground on which to quiet title in favor of Plaintiffs.[26] Moreover, quiet title actions only lie when the plaintiff's title is superior to the defendant's; they cannot be used merely to challenge a defendant's claim to title, as Plaintiffs here are attempting to do.[27] Dismissal of Count II is required for this reason as well.

Finally, Count III, alleging negligent misrepresentation, claims that Defendants hid the identity of the real party holding the mortgage and of the noteholder when MERS, as mortgagee, assigned the mortgage to BONY. Complaint ¶¶ 74-89. This Count fails to state a cognizable claim for relief under Rhode island law for multiple reasons.

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[25] *Meyer v. City of Newport*, 844 A.2d 148, 151 (R.I. 2004); *Harritos v. Cambio*, 1996 WL 936906, at *7 (R.I. Super. Ct. Mar. 13, 1996), *aff'd*, 683 A.2d 359 (R.I. 1996).

[26] *Ingram*, 2012 R.I. Super. LEXIS 77, at *9-12 (plaintiff had no claim to quiet title in case where assignee via MERS held record title); *Noury*, 2012 R.I. Super. LEXIS 74, at *9-11 (same); *see also Estrella*, 2012 R.I. Super. LEXIS 108, at *6-7 (no claim to quiet title absent demonstration by plaintiff of legal right to rescission of foreclosure sale); *Rosano*, 2012 R.I. Super. LEXIS 95, at *16-18 (same).

[27] *O'Brien*, 2012 R.I. Super. LEXIS 84, at *21 (citing *Franklin v. Laughlin*, 2011 WL 598489, at *26 (W.D. Tex. Jan 13, 2011)) (in quiet title action, burden of proof rests with plaintiff to prove good title in himself); *Noury*, 2012 R.I. Super. LEXIS 74, at *11 (same); *see also* 65 Am. Jur. 2d Quieting Title §§ 63 ("[A] person who has no estate or interest in, or lien or encumbrance upon, the real property may not maintain an action to determine adverse claims to it."), 72 (plaintiff's burden of proof in quiet title action "is not satisfied merely by pointing to a weakness in, or challenging, the defendant's title").

First, no statement was made to Plaintiff in the assignment. The assignment was executed between MERS and BONY and Plaintiff was not a party to the document. The claim should be dismissed for this reason alone. *Western Reserve Life Assurance Co. of Ohio v. Caramadre,* 847 F. Supp. 2d 329, 343 (D.R.I. 2012) (party cannot raise fraud claim on behalf of non-parties to contract because non-parties are not bound by contract); *Hillside Metro Assocs., LLC v. JPMorgan Chase Bank, Nat'l Ass'n*, 2011 WL 5008368, at *7 (E.D.N.Y. Oct. 20, 2011) (non-party plaintiff cannot sue based solely on defendant's breach of contractual duty owed to another) (citation and internal quotation omitted); *Thomas v. Guild Mortg. Co.*, 2011 WL 676902, at *4 (D. Ariz. Feb. 23, 2011) (non-party to mortgage cannot raise fraud claim against lender based on mortgage provisions or failure to disclose)*; see also* footnote 8 *supra*.

Second, there was no misstatement of the real party holding the mortgage. The mortgage Plaintiffs signed designated MERS as mortgagee; the Assignment also stated that MERS was mortgagee; and the Assignment stated that MERS was assigning its interests to BONY. *See* Mortgage at p.1, Assignment of Mortgage at p. 1. The Rhode Island Supreme Court has unequivocally held that MERS may serve as mortgagee and may assign its interests. *Bucci*, 68 A.3d at 1084-85; *see* Section I.C.1 *supra*.

Third, under Rhode Island law, the party foreclosing need not identify the holder of the loan. R.I. Gen. Laws § 34-11-22; *Bucci*, 68 A.3d at 1086-87. Rather, in Rhode Island a foreclosure is appropriate so long as it is conducted by the mortgagee. R.I. Gen. Laws §§ 34-11-22, 34-11-24; *Bucci,* 68 A.3d at 1081; *Kriegel v. Mortg. Elec. Registration Sys.*, 2011 WL 4947398 (R.I. Super. Ct. Oct. 13, 2011); *Payette v. Mortg. Elec. Registration Sys.*, 2011 WL 3794700 (R.I. Super. Ct. Aug. 22, 2011). Thus, even if the Assignment had misstated the true owner of the loan, that misstatement would not be material to Plaintiffs – another ground for dismissal of the claim. *Cruz v. DaimlerChrysler Motors Corp.*, 66 A.3d 446, 453 (R.I. 2013) (affirming dismissal where plaintiff could not show demonstrate “misrepresentation of a material fact”); *Kennett v. Marquis*, 798 A.2d 416, 419 (R.I. 2002) (affirming dismissal where no showing that defendant delivered false information); *514 Broadway Inv. Trust, UDT 8/22/05 ex rel. Blechman v. Rapoza*, 816 F. Supp. 2d 128, 135 (D.R.I. Sept. 7, 2011) (dismissing defendant where plaintiff could not show defendant made a material misrepresentation).

Fourth, Plaintiffs’ assertion that the true owner of the loan was not disclosed fails to state a claim. However, their Complaint nowhere identifies the supposed “true owner” of the loan. Courts regularly dismiss claims alleging that some other lender owned a loan when such vague claims are asserted. *See, e.g., Jimenez v. People’s Choice Home Loan, Inc.*, 2012 R.I. Super. LEXIS 107, at *14-15 (R.I. Super. Ct. July 10, 2012) (assignee of mortgage had power to foreclose despite allegation that original lender never negotiated the note to another party); *Porter v. First NLC Fin. Servs., LLC*, 2011 WL 1251246 (R.I. Super. Ct. Mar. 31, 2011) (dismissing claims including allegations that foreclosing party did not own note; “whatever financial entity currently holds the beneficial interest of the Note, MERS is designated the nominee for the current beneficial owner of the Note based upon the broad language contained in the Mortgage Agreement”).

Finally, although Plaintiff complains about conduct related to the foreclosure proceedings against the property, the relationship between a lender and a borrower – or between a mortgagor and a mortgagee – does not give rise to a duty of care as a matter of law.[28] Plaintiffs and

[28] *Santucci v. Citizens Bank of R.I.*, 799 A.2d 254, 257 (R.I. 2002) (relationship between bank and depositors gives rise to no duty of care for negligence claim); *Tavares ex rel. Guiterrez v. Barbour*, 790 A.2d 1110, 1112 (R.I. 2002).

Defendants stood in an ordinary commercial relationship in which no duty of care was owed.[29] No "misrepresentation" occurred because no obligation to speak existed. *Santucci*, 799 A.2d at 257; *Nye v. Brousseau*, 2013 WL 3722323, at *7 (R.I. Super. Ct. July 10, 2013) (no misrepresentation absent a duty to speak); *Guilbeault v. R.J. Reynolds Tobacco Co.*, 84 F. Supp. 2d 263, 269 (D.R.I. 2000) (same).[30]

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29 *Santucci*, 799 A.2d at 257 ("the rights and obligations of each with respect to the fund on deposit are governed by the terms of the contract which they enter into at the time of the establishment of the relationship") (internal quotation and citation omitted); *Sovereign Bank v. Fowlkes*, 2010 WL 331965 (R.I. Super. Ct. Jan. 25, 2010) (citing *Griffin v. Centreville Sav. Bank*, 171 A.2d 204, 206-207 (R.I. 1961)) ("Under Rhode Island law, those parties that stand in the debtor and creditor relationship will be governed by the terms of the contract which they enter into at the time of the establishment of the relationship.").

30 The Complaint also alleges misrepresentations regarding the execution of the assignment and the executor's authority to do so. Complaint ¶¶ 78-84, 86-87. However, as shown above, MERS may appoint corporate officers to execute assignments of mortgages and other documents on its behalf, and such an appointed party is presumed to have authority to execute the document under Rhode Island law. *See* Section I.C.3 *supra*.

CONCLUSION

For these reasons, Defendants Mortgage Electronic Registration Systems, Inc., Greenpoint Mortgage Funding, Inc., Bank of America, N.A. (successor by merger to BAC Home Loans Servicing, LP), and The Bank of New York Mellon as Successor to JP Morgan Chase Bank, N.A., respectfully request that the Court grant this Motion and dismiss all claims against them in the Complaint with prejudice.

Respectfully submitted,

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Dated: December 9, 2013

CERTIFICATE OF SERVICE

I, Harris K. Weiner, hereby certify that on December 9, 2013, a copy of the foregoing document, filed through the CM/ECF system, will be sent electronically to counsel of record.

/s/ Harris K. Weiner
Harris K. Weiner